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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969 No. 264

GORDON S. MILLER and
FRANCES G. MILLER, his wife
Petitioners

v.

WILLIAM B. CAMP, Comptroller of Currency
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968 No.

IN THE MATTER OF: THE CONSERVATORSHIP OF THE WELLSVILLE NATIONAL BANK, WELLSVILLE, PENNSYLVANIA

GORDON S. MILLER AND FRANCES G. MILLER,
Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gordon S. Miller and Frances G. Miller pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case in February 19, 1969 (rehearing denied, March 21, 1969).

The Opinion of the District Court is unreported and is printed as Appendix "A" hereto. The Opinion of the Court of Appeals affirming District Court is unreported and is printed as Appendix "B" hereto. The order denying the rehearing is printed as Appendix "C" hereto.

JURISDICTION

The Judgment of the Court of Appeals, affirming the District Court was entered on February 17, 1968, and a Petition for Rehearing, filed March 3, 1969, was denied March 21, 1969. This case arose under the provisions of

The Bank Conservation Act (48 Stat. 1, et.seq. 12 U. S. C. §201, et seq.) and the jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). The questions presented were raised before both the District Court and the Court of Appeals.

QUESTIONS PRESENTED

May the District Court approve an order of the Comptroller of Currency, selling an operating National Bank to a competitor without a hearing or other judicial review under such terms as to wipe out all stockholder equity where the only information before the Court were affidavits by the Comptroller of Currency concluding that this sale was necessary?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Bank Conservation Act (48 Stat. 1, et.seq., 12 U. S. C. §201, et seq.) and especially Section 3 (48 Stat. 2, 12 U. S. C. §203).

STATEMENT

Petitioners were majority stockholders in The Wellsville National Bank (Wellsville), operating in York County, Pennsylvania and Petitioner Gordon S. Miller was the President of the bank until May, 1965.

As a result of a series of examinations of the Bank, between March, 1963 and December, 1966, the office of the Comptroller of Currency concluded that there had been a pattern of improper loans, loans collateraled by worthless assets, poor management and other conditions (20a-21a) as a result of which its was "determined that the bank was dangerously close to insolvency" (21a).

Although the bank was still operating and its doors were open, the Comptroller appointed a Conservator, pursuant to Section 3 of the Bank Conservation Act, 12 U. S. C. § 203 and coincident with this appointment, instructed the Conservator to enter into an agreement to sell all the assets of Wellsville to the Hanover Bank and Trust Company (Hanover), a competing state bank (8a, 21a-22a). The Conservator executed the agreement, under the terms of which all the assets of Wellsville were transferred to Hanover. The only consideration was that Hanover would assume the liabilities of Wellsville and would also attempt to collect loans which Hanover categorized as "classified" (i.e. loans unacceptable to it). Hanover would then pay over to Wellsville the net amount of the "classified" loans which it collected after first deducting any outstanding liabilities of Wellsville, the costs of collection, and fees to Hanover for services rendered (13a-16a). Since Hanover could categorize as "unclassified" all loans having any possibility of collection, and retain the amounts collected for its own account, the effect wast to simply *give* the assets of a solvent bank to a competitor, at the same time, wiping out any stockholder equity.

The Comptroller petitioned the District Court for an order approving this sale, and the Court approved the sale by order dated January 28, 1967, giving interested parties five (5) days to object. Petitioners then filed timely motions to intervene and vacate the January 28th order. These motions were denied without taking testimony and Petitioner appealed to the Court of Appeals for the Third Circuit.

The District Court held that Petitioners had no right to a hearing on the issue of whether the Comptroller's actions were fair, just and equitable. It viewed the proceeding on the Comptroller's motion to approve as being merely advisory stating:

> By inviting stockholders of the Wellsville Bank to object to [its] Order of January 28, 1967, or to show cause why it should be set aside, this Court was motivated by a *cautious wish to gain advice that would be helpful* in finally determining whether or not the order applied for by the (Comptroller) should be granted . . . ." (emphasis supplied) (55a)

Petitioners argued that the affidavits of the Comptroller which the District Court considered in approving the sale were merely the Comptroller's conclusions based on an evaluation of the raw data supplied by the bank examiners themselves. It was this raw data which was the important evidence (or information) and yet it was never considered by the Court or even made part of the record. With no opportunity to study the data, much less to subject it to cross-examination, the conclusions of the Comptroller that the bank was mismanaged and insolvent could not be challenged. There was thus no way to check on his arbitrariness nor limit his discretion.

In their reply brief to the Circuit Court, Petitioners nevertheless attempted to challenge the validity of the Comptroller's conclusions by attacking his reasoning. Numerous internal inconstancies were demonstrated which reflected on the accuracy of the raw data and the objectivity of the Comptroller in evaluating it.

The Court of Appeals attempted to avoid these issues. In discussing the power of the Comptroller under the Act, that Court simply assumed that the bank was insolvent. This bootstrap argument, of course, removed one of the crucial issues from the case. The insolvency was never proved by anything even approaching evidence. In fact, the Court of Appeals apparently concedes that the sale of the bank's assets was legal only if there was an insolvency.

The Court, however, never decided the issue of reviewability. It merely shifted the burden of proof

onto, Petitioners, and held that since they did not deny the insolvency, there was "no dispute before the District Court" and the District Court acted within its discretionary authority in accepting as true the Comptroller's allegation of insolvency (Opinion 7-8). This argument fails both factually and legally. The Court admitted that the Comptroller failed specifically to allege insolvency in his affidavit in support of his motion to approve the sale of the bank yet, in Petitioners' Motion to Vacate which was in the nature of a reply to the Comptroller's Motion, the denial of insolvency is implicit and almost explicit in paragraph 17 and 18 of their Motion (32a).

REASONS FOR GRANTING THE WRIT

The Comptroller proceeded under the Bank Conservation Act, in order to avoid the judicial review required under Sec. 5220 Rev. Stats. (12 U. S. C. § 181) providing for dissolution of National Banks.

This case is an example of unchecked administrative arbitrariness. It clearly demonstrates the need for judicial review of administrative acts.

The Court of Appeals ignored its own controlling decision of *Minichello* v. *Saxon*, 337 F. 2d 75 (3d Cir. 1964) *reversing* 207 F. Supp. 299 (M. D. Pa. 1962).

The only difference between the two cases is that in *Minichello*, the Comptroller terminated the conservatorship by returning the assets and control of the bank to its Board of Directors "For the purpose of executing a sale of all assets of the Bank" to another bank. In the instant case, the Conservator himself executed the agreement of sale. But this difference was crucial since the sale by the Board of Directors was a liquidation and under Sec. 5220 Rev. Stats. (12 U. S. C. § 181) required stockholder approval unless the Comptroller found that an emergency existed. The Comptroller, therefore, in his

order, specifically found the existence of an emergency and waived shareholders' approval.

On appeal, the Court of Appeals held that this determination of the existence of an emergency was reviewable. After finding that Congress intended to increase the protection to shareholders by its 1959 Amendment to Section 181, that Court held:

> "To construe the statute as entrusting to the Comptroller nonreviewable discretion in this area would have the opposite effect, e.g., that of decreasing the safeguards available to shareholders under pre-existing law, in at least one basic respect." 337 F.2d at 83.

As a result, an evidentiary hearing was held, reported in *Minichello* v. *Saxon;* 266 F. Supp. 279 (M.D. Pa. 1967) *aff'd, sub. nom., Minichello* v. *Camp,* 394 F.2d 715 (3d Cir. 1968).

Faced with a similar problem in the instant case, the Comptroller eschewed the procedures of *Minichello;* he did not want his discretion reviewed. Therefore, rather than terminating the conservatorship with an order to the bank's directors to sell (under 12 U. S. C. 205), he merely ordered the sale under the conservatorship itself, thereby attempting to avoid the necessity of having to make a reviewable finding that an "emergency" existed. In addition to eliminating judicial review, this would also eliminate the requirement of stockholder approval. This plan by the Comptroller was no more than a subterfuge. Section 181, although headed "voluntary dissolution" in U. S. C. A., is silent on the issue of either voluntariness or compulsion. What it does require, for a dissolution, is shareholder approval. The dissolution in *Minichello* was as involuntary as in the instant case. The order in *Minichello* was made pursuant to 12 U. S. C. §205, which is part of the same Bank Conservation Act as is § 12 U. S. C. 203. This same

Act, in fact specifically, provides for shareholder approval in any reorganization "which under existing law, requires the consent . . . (b) of the stockholders" §12 U. S. C. 207. This is a clear reference, at least to section 181, and incorporates that section into the Conservation Act.

As is conceded by the government, there are no cases, except *Minichello*, concerning the sale of all assets of a bank under the Bank Conservation Act, where the bank was still operating and *Minichello* required review.

Of interest also is *Community National Bank* v. *Gidney*, 792 F. Supp. 514 (E.D. Mich. 1961) in which the District Court first held that the decision of the Comptroller of Currency in approving a branch bank was not reviewable. However, it apparently modified its reported opinion and held that the decision was reviewable to determine if the Comptroller's action was arbitrary and capricious. This is clear from the affirmance. See *Community National Bank* v. *Saxon*, 310 F.2d 244, 245 (6th Cir. 1962).

Petitioners here were not even given this limited review. This review is also the minimum required by the Administrative Procedure Act, 5 U. S. C. §701 (1966). See Berger, *Administrative Arbitrationsness and Judicial Review*, 65 Col. L.Rev. 55 (1965) discussing the predecessor to the present Act. It is also the minimum required by due process. To hold otherwise, would, as was argued in the court below, amount to a taking without compensation, in violation of the Fifth Amendment of the Constitution. This view was argued strenuously in the Court below.

CONCLUSION

Petitioners merely seek the right to question the unsubstantiated conclusions of the Comptroller of Currency's conclusion as a result of which he was able to unilaterally divest Petitioners of their equity in the Wellsville Bank.

Petitioners believe that Comptroller's actions were arbitrary and capricious and therefore must be subject to judicial review.

For the foregoing reasons, this Petition for a Writ of Certiorari must be granted.

Respectfully submitted

MITCHELL A. KRAMER

Attorney for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17051

IN THE MATTER OF: THE CONSERVATORSHIP OF THE WELLSVILLE NATIONAL BANK, WELLSVILLE, PENNSYLVANIA

GORDON S. MILLER AND FRANCES S. MILLER,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued November 19, 1968

Before: GANEY, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 17, 1969)

By GANEY, *Circuit Judge.*

This is an appeal by two minority stockholders of the Wellsville National Bank ("Bank"), Borough of Wellsville, York County, Pennsylvania, from the denial by the United States District Court for the Middle District of Pennsylvania, of their motion to vacate that court's order of January 28, 1967, approving a proposed agreement between the Conservator of the Bank and the Bank of Hanover and Trust Company ("Hanover") for the sale of all the assets of the Bank in exchange for Hanover's assumption of all the liabilities (other than to the shareholders as such) of the Bank. Hanover is a State banking institution, organized and existing under the laws of Pennsylvania, with its principal place of business in the Borough of Hanover, York County, Pennsylvania.

Pursuant to the power vested in him by the Bank Conservation Act,[1] William B. Camp, the Acting Comptroller of the Currency of the United States, notified Michael C. Kearns, by letter dated January 25, 1967, of his appointment as Conservator for the Bank. The letter stated:

> "You are appointed Conservator of [the Bank], . . . effective 10:30 a.m., January 28, 1967. At that time, you will take charge of the bank but will continue regular banking operations receiving deposits and paying out money in the normal course of business . . . .
>
> "You are directed, immediately after taking charge, to enter into an agreement with [Hanover] for the sale of all the assets of [the Bank] to [Hanover] in consideration of the assumption by [Hanover] of all the deposits and other obligations and liabilities of [the Bank] (other than liabilities to the shareholders of [the Bank] as such) on terms as a court of record of competent jurisdiction shall direct."[2]

On January 28, the day his appointment became effective, the Conservator presented a petition to the United States District Court for the Middle District of Pennsylvania, to sell the assets of the conservatorship estate. Accompanying the petition was a copy of the commission appointing Kearns the Conservator of the Bank, the letter of notification, the purchase and assumption agreement and an affidavit of the acting Comptroller. The latter document stated as one of the reasons for appointing the conservator and directing him to sell the assets of the Bank to Hanover was that the Bank was "dangerously close" to insolvency, that the solvency and safety of the Bank have been "seri-

---

1 48 Stat. 2 (1933), U.S.C.A. §§ 201 et seq.

2 The letter further directed: "For this purpose you will, immediately after taking charge, sign in the presence of an attesting witness the proposed agreement already executed on behalf of the Bank of Hanover and Trust Company and notify by telephone the Regional Administrator who will be in the United States Attorney's Office in Scranton, Pennsylvania . . . ."

ously impaired" for an extended period of time and that the condition had steadily worsened, and that the existing management could under no circumstances be permitted to continue in control of the Bank.

On that same day, District Judge William J. Nealon, Jr., signed an order approving the purchase and assumption agreement. The order stated the Court had concluded that the agreement was "fair, just, and equitable, and that the sale of the assets of the Conservatorship estate, as contemplated by said agreement, is in the best interests of the Conservatorship estate." The order further provided "that service of a copy of this Order be made upon all stockholders of the Wellsville National Bank by certified mail, return receipt requested, and that said stockholders are given five (5) days from date of service of this Order to object to this Order or show cause why it should be set aside."

On February 6, 1967, Gordon S. Miller, a shareholder of the Bank, and his wife[3] filed their "Motions to Intervene" and "Motion to Vacate January 28, 1967 Order." On March 15, 1967, the acting Comptroller filed a paper entitled "Opposition to Motion to Vacate and Motion to Intervene", accompanied by his affidavit. This latter document stated, inter alia, that there were three principal problems facing the Bank which led him to conclude that an immediate sale by the conservator of all the assets of the Bank was the best available course for the protection of the banking public and the Bank's depositors, creditors and shareholders. These three problems were (1) the apparent and continuing insolvency of the Bank and all the improper banking practices which had led to insolvency, (2) the continuing inability of those in control of the Bank

[3] The Wellsville National Bank's stock ledger as of January 28, 1967, showed that Gordon Miller was the owner of 100 shares of the bank's stock (or 10 percent of the shares outstanding) and that his wife, Frances, was not listed as owning any shares either individually or jointly. It also showed that the Bank of Hanover and Trust Company was the owner of 508 shares (or 50.8 percent of the shares outstanding).

to raise new capital, and (3) the improper and possible unlawful activities of Gordon S. Miller (one of the objecting minority stockholders) at various times President, Chairmain of the Board and principal individual shareholder of the Bank. The fifth paragraph of the affidavit stated: "5. That the regular and special examinations of the Bank conducted since assumption of control by Gordon S. Miller, disclosed continuing difficulties with loans, capital, liquidity and credit culminating in insolvency, none of which could be resolved in the normal course of supervision or in repeatedly discussions with [the Bank's] directors."

The Millers first contend that the acting Comptroller exceeded his authority when he entered into an agreement of sale to turn over the Bank to a State bank and then appointed a conservator for the purpose of executing the already prepared and signed agreement when the Bank was operating, meeting all its demands and was not placed in receivership or declared insolvent. Section 203 of the Bank Conservation Act, 12 U. S. C. A. §203, provides in part: "Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank . . . ." Under this section, the appointment of a conservator is discretionary on the comptroller's part and is not subject to judicial review. See *Davis Trust Co.* v. *Hardee,* 85 F.2d 571 (C.A. D.C. 1936). Also see discussion in *Minichello* v. *Saxon,* 337 F.2d 75, 83 (C.A. 3, 1964) cert. denied, 380 U. S. 952.[4]

Regarding the sale of the assets of a national bank, section 203 further provides: "Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national bank . . . .

[4] On remand, 266 F. Supp. 279 (M.D. Pa. 1967), *aff'd per curiam sub nom. Minichello* v. *Camp,* 394 F.2d 715 (C.A. 3, 1968), where this Court said: "Ample evidence to support the conclusion of the District Court, that the Comptroller could have reasonably found that an emergency existed at the time stated."

During the time such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this subchapter, be the same as if a receiver had been appointed therefore . . . ." The powers of a national bank receiver are set forth in sections 16 and 17 of the Act of September 8, 1959, 73 Stat. 458, 12 U. S. C. A. §§ 191 and 192. Section 191, U. S. C. A., in part, provides: "*Whenever . . . the comptroller shall become satisfied of the insolvency of a national banking association,* he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association." (Emphasis added). Section 192, U. S. C. A., states: "On becoming satisfied, as specified in sections 131 and 132 [U. S. C. A.] of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, . . . Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct . . . ."

It can be said on behalf of the acting Comptroller that the words, "Whenever . . . the comptroller shall become satisfied of the insolvency of a national banking association" appearing in § 191, U. S. C. A., gives him the discretion to make a determination of whether a national bank is insolvent[5] and that such determination is not reviewable by

[5] The National Bank Act and the Bank Conservation Act do not define insolvency. Neither do the regulations of the Comptroller. However insolvency within the meaning of the National Bank Act encompasses both the inability of a bank to meet its obligations as they mature and the closing of its doors. "Its status is [not] determined . . . by the theoretical state of its balance sheet which may include assets whose actual value is far less than that at which they are carried on its books." *Smith* v. *Witherow*, 103 F.2d 638, 641 (3 Cir. 1939). And in *Commercial National Bank in Shreveport* v. *Connolly*, 176 F.2d 1005, 1007 (C.A. 5, 1949), the Court noted that a requisite for a bank to be solvent is that it must own assets in an amount at least equal to its liabilities.

the courts. However, it becomes necessary to discuss both Acts concerning review.

In *Minichello* v. *Saxon, supra.* 337 F. 2d 75, 82-84 (C.A. 3, 1964), a derivative shareholders' action to invalidate a sale of assets of a national bank in which this Court concluded that the comptroller's determination under § 181, U. S. C. A., of the National Bank Act, respecting the existence of an emergency so as to obviate the necessity of the approval of a sale of the bank's assets by shareholders owning two-thirds of its stock is reviewable by the courts. However, the court is there construing the 1959 amendment to § 181 which, in no wise, concerns a conservatorship. This section is concerned with the ordinary sale of bank assets and provides that in a purchase or sale of bank stock, "unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval", the necessary two-thirds of the bank's stock is unnecessary. In it, the court points out that the emergency phrase and the waiver phrase are conjoined. The court states: "The language employed with respect to emergency is sharply distinguishable from that evidenced in other sections of the national banking statute involving decisions of the Comptroller such as those concerning appointment of a conservator and termination of a conservatorship." (Page 83) Section 203, 12 U. S. C. A., reads, in part: "*Whenever he shall deem it necessary* in order to conserve the assets of any bank . . . the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security *as the Comptroller of the Currency deems proper.*" (Emphasis added). The court points out in § 205, U. S. C. A., as how termination of a conservatorship contains substantially similar language and states further: "We cannot consider the differing language in Section 181 to have been employed inadvertently, particularly in view of the fact that the moving force in the enactment of the amendment was a desire on the part

of Congress to increase protection for shareholders. To construe the statue as entrusting to the Comptroller a non-reviewable discretion in this area would have the opposite effect, e.g., that of decreasing the safeguards available to shareholders under pre-existing law, in at least one basic respect." and concludes that the Comptroller's declaration of an emergency under this section is reviewable. It is to be remembered here that the Court is construing Section 181 of the National Bank Act. In the instant case, we are construing Section 203 of the Bank Conservation Act, 12 U. S. C. A. In other words, the analogy is to two different and separate situations.

It is submitted that the language in § 191, U. S. C. A., adverted to previously, providing, "Whenever . . . the comptroller shall become satisfied of the insolvency of a national banking association" and § 192, U. S. C. A., adverted to, likewise, heretofore, using the phrase "on becoming satified" in connection with the sale by a receiver, denotes a phraseology comparable to Section 203 and thus is not reviewable by virtue of the differentiation in wording of the sections permitting discretion, as pointed out in *Minichello* v. *Saxon, supra.* However, for reasons hereinafter set forth, we need not reach this question.

While this matter was in the District Court, although they admitted that the capital structure of the Bank was impaired, the Millers did not deny the insolvency of the Bank or offer an affidavit setting forth facts to support a claim that there was no justification for a determination that the Bank was insolvent. True, the first affidavit of the acting Comptroller did not flatly assert that the Bank was insolvent. However, his second affidavit gave "the apparent and continuing insolvency of the Bank and all the improper banking practices which had led to insolvency" as one of the reasons for concluding that a sale of all the assets of the Bank was the best available course for the Bank's depositors, creditors and shareholders.

Even though their motions were filed some thirty-seven days before the second affidavit, the Millers had a period of six months in which to take some action that might have caused the District Court to grant them a hearing on that issue.[6] Under the circumstances, the accepting of the allegations of the second affidavit as being true was within the discretion of the District Court.[7]

There having been no dispute before the District Court that there was no basis for the acting Comptroller's satisfaction as to the insolvency of the Bank, its order approving the sale on such terms as it should direct is conclusive upon us is not subject to attack for fraud. See *Griggs* v. *Baumer*, 130 F.2d 899 (3 Cir. 1942). Accord: *In the Matter of the Receivership of the Home National Bank of Ellenville*, 147 F. Supp. 389 (S. D. N. Y. 1956). But if the order were appealable, we would be of the view that the District Court did not abuse its discretion since the only matter in the record which could possibly make this order reviewable is the refusal of the court to act favorably to the letter of February 6, 1967, addressed to the board of directors of the Bank from a person claiming to represent "a group of prominent citizens", whose names were not mentioned, "willing and able" to purchase the Bank. We are not aware of any rule requiring a court of record to establish the unavailability of alternative solutions to the sale of a national bank to a buyer designated by the comptroller.

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[6] The date of the District Court's memorandum denying the Millers' motions was September 19, 1967.

[7] In a case where a majority stockholder brought suit to oust a receiver of a bank in the District of Columbia, appointed by the Comptroller who determined that the bank was insolvent on his appraisal of the value of its securities, the Court of Appeals for the District of Columbia noted: "It has been held by a long array of authorities that where the Comptroller of the Currency has held a bank to be insolvent and has appointed a receiver for it, the court will not substitute its judgment for the judgment of the Comptroller, *unless it appears by convincing proof that the Comptroller's action is plainly arbitrary*, and made in bad faith." (Emphasis added.) See *United States Saving Bank* v. *Morgenthau*, 85 F.2d 811, 814 (1936), cert. denied, 299 U. S. 605, rehear. denied, 301 U. S. 666.

The final contention of Miller is that the action of the acting Comptroller is a taking of his property without due process of law and without just compensation is without substance. In *Smith* v. *Witherow*, 102 F.2d 638, 641 (1939), this Court said: ". . . . The original subscriber and all vendees of his shares, upon assuming the status of a stockholder, assume it subject to the conditions and burdens imposed by the statute as incident to the holding of national bank shares. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 57 Ct. 151, 81 L. Ed. 133 . . . ."

Accordingly, the appeal will be dismissed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,051

IN THE MATTER OF: THE CONSERVATORSHIP OF THE WELLSVILLE NATIONAL BANK, WELLSVILLE, PENNSYLVANIA

GORDON S. MILLER AND FRANCES G. MILLER,
Appellants.

(D. C. Civil Action No. 9829)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GANEY, FREEDMAN AND SEITZ, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middile District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal from the order of the said District Court, filed September 19, 1967, be, and the same is hereby dismissed. Costs taxed against appellants.

Attest:
THOMAS F. QUINN
Clerk

February 17, 1969

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 17,051

In the Matter of: THE CONSERVATORSHIP OF THE WELLSVILLE NATIONAL BANK, WELLSVILLE, PENNSYLVANIA

GORDON S. MILLER and FRANCES G. MILLER,
Appellants.

Sur Petition for Rehearing

Present: Hastie, *Chief Judge*, Kalodner, Ganey, Freedman, Seitz, Van Dusen, Aldisert and Stahl, *Circuit Judges.*

The petition for rehearing filed by the appellants, Gordon S. Miller and Frances S. Miller, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Freedman
Judge

Dated: March 21, 1969.

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN THE MATTER OF THE CONSERVATORSHIP OF THE WELLSVILLE NATIONAL BANK, WELLSVILLE, PENNSYLVANIA	No. 9829 CIVIL

MEMORANDUM

On January 25, 1967, the Acting Comptroller of the Currency (Comptroller) appointed Michael C. Kearns, Conservator for the Wellsville National Bank (Wellsville) effective as of 10:30 A.M., January 28, 1967, pursuant to the power vested in the Comptroller by the Bank Conservation Act.[1]

The Conservator then applied to this Court for an Order ratifying and approving a proposed agreement between the Conservator of the Wellsville National Bank and the Bank of Hanover and Trust Company (Hanover) for the sale of the assets of the Conservatorship estate. The Court, on January 28, 1967, "ratified and approved" the agreement as "fair, just and equitable" and "in the best interests of the Conservatorship estate", adding the proviso that a copy of the Order be served upon all stockholders of the Wellsville National Bank and that the stock-

1 48 Stat. 2 (1933), 12 U.S.C. §§ 201-213 (1945). 12 U.S.C. § 203 provides, in pertinent part:

"Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank . . . The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the (same) obligations . . ."

A receiver ". . . under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct . . ." Title 12 U.S.C. § 192.

holders be given five days from the date of service to "object" to the Order or "show cause why it should be set aside."

Gordon S. Miller, an averred stockholder and creditor of Wellsville, and his wife, Frances G. Miller, an averred depositor and stockholder in Wellsville,[2] seek to intervene in this matter and to have the Court vacate its Order because the agreement therein ratified was unfair, unjust and inequitable. They are the only shareholders who have taken exception to the Order.

Clearly, this is not a judicial controversy,[3] but an exercise of supervisory administrative power. Griggs v. Baumer 130 F.2d 899 at 901 (3d Cir. 1942), invested in a functionary which Congress supposes has "knowledge of the local circumstances which enter into the problem of obtaining an adequate price for . . . property". Fox v. Young, 20 A. 2d 835, 145 Pa. Super. 111 at 113 (1941). Pragmatically the statutory requirement that the Conservator obtain approval from the Court for a sale also serves as a precautionary check upon what would be otherwise unlimited power vested in the Comptroller. Mitchell v. Joseph, 117 F. 2d 253 at 255 (7th Cir. 1941).

Thus the approach of the stockholders in seeking to intervene is inappropriate. By inviting stockholders of the Wellsville Bank to object to the Order of January 28, 1967, or to show cause why it should be set aside, this Court was motivated by "a cautious wish to gain advice that would be helpful in finally determining whether or

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[2] Government records indicate that as of January 28, 1967, Gordon S. Miller was the owner of 100 shares of Wellsville stock (10% of the outstanding shares) and Frances G. Miller did not own, individually or jointly, any Wellsville stock. (Opp. to Mot., #8, p. 2 (N**)).

[3] Were this a matter of first impression, consideration of whether a United States District Court has the jurisdiction to act in an advisory or administrative capacity in light of Article III, Section 2 of the United States Constitution, would be appropriate. Since the passage of the Bank Conservation Act over 1,100 banks have been placed into conservatorship. Comptroller of Currency, Annual Reports 71st to 192nd, U. S. Treasury Department (1933-1964) (Doc. #8, p. 13). A statute so often utilized will not now be questioned by this Court. In Re Home National Bank of Ellenville, N.Y., 147 F. Supp. 389 (1956).

not the order applied for by the (Comptroller) should be granted", Fifer et al. v. Williams, 5 F. 2d 286 at 289 (9th Cir. 1925). Obviously, where the Court must exercise an executive, informed, independent judgment, adequate trustworthy information should be obtained from all available sources. Roth v. Hood, 106 F. 2d 616, 618 (6th Cir. 1939).[4] The Court receives and evaluates the information in an administrative capacity, however. Therefore, stockholders' motion to intervene will be denied, but the stockholders' averments will be received and evaluated in order to enable the Court to better carry out its task. While it is clear issuance of a final order approving a sale exhausts the supervisory authority of the Court, Griggs v. Baumer, supra, this is not to say if stockholders can show evidence of a fraud which prevented the Court from making an informed independent judgment, an independent action may not be brought for redress. Oosterhuis v. Palmer, 137 F. 2d 332 (2d Cir. 193); Fox v. Young, supra, at 114 (and cases cited therein at Fn. 4). Accordingly, with this object in mind, a review of the pleadings and record is appropriate.

BACKGROUND

Wellsville is a national banking association, organized and existing under the laws of the United States, having its sole place of business in Wellsville, York County, Pennsylvania.

Hanover is a State banking association, organized and existing under the laws of Pennsylvania, having its principal place of business in Hanover, Pennsylvania.

In a cover letter dated January 25, 1967, to the Conservator, the Comptroller directed him "immediately after taking charge (of Wellsville), to enter into an agreement with Bank of Hanover and Trust Company for the sale

[4] Indeed, the Government concedes that this is so. (Doc. #8 p. 4)

of all of the assets of the Wellsville National Bank to Bank of Hanover and Trust Company in consideration of the assumption by Bank of Hanover and Trust Company of all of the deposit and other obligations and liabilities of the Wellsville National Bank (other than liabilities to the shareholders of the Wellsville National Bank as such) on such terms as a court of record of competent jurisdiction shall direct."

In the subject agreement, Hanover agrees to divide all of Wellsville's outstanding loans into two categories, "classified" and "unclassified."[5] Doubtful or "unclassified" assets will be liquidated to the extent possible and will provide some consideration for the liabilities assumed by Hanover. Detailed records are to be kept by Hanover of "unclassified" assets. Any surplus in the value of the total assets of Wellsville over the aggregate liabilities assumed by Hanover are to be returned to the liquidating committee of Wellsville for eventual distribution to the shareholders.

COMPTROLLER'S AVERMENTS

The Comptroller submitted an affidavit, dated March 8, 1967, concerning the recent background of the Wellsville Bank, the details of which follow:

The examination report[6] of March 11, 1963, showed four excessive general loans and four questionable real estate loans in Wellsville's portfolios. The loans lacked adequate credit data support and internal control. Active management of Wellsville was termed "inexperienced."

The examination report of August 2, 1963, revealed an unwarranted concentration of out-of-territory loans brought into the Bank by Gordon Miller and H. Elliot America, Vice President and Cashier of the Wellsville Bank. These loans were not justified by supporting data

[5] "Unclassified" loans are those which meet minimum banking standards. "Classified" loans, of course, are the converse.

[6] Hereinafter, the phrase "examination report" refers to the written analyses of Wellsville's condition by the Comptroller's office.

and placed the Bank in an illiquid position. According to this report, Miller had not informed other Bank Directors that bank drafts were not being immediately recorded when issued for loan proceeds and that the Bank was undercapitalized.

The examination report of January 2, 1964, showed Wellsville had an overload of unsound credits and was in need of additional capital. The situation was considered unsound and possibly dangerous.

On February 17, 1964, the Bank was placed on a special list by the Comptroller so that it would be examined every ninety days.

Throughout May, June and July, 1964, the Wellsville Directors and Miller were repeatedly advised of the Bank's unsound condition, the continuing acquisition of questionable, unsupported, out-of-territory loans, gross undercapitalization, and the fact that substandard paper totaled more than three times the amount of capital funds, confirming the likelihood heavy losses would occur at Wellsville.

The examination report of September 14, 1964, indicated that the Bank was insolvent and Miller and the Directors were informed by the Comptroller they had three alternatives: (1) raise new capital; (2) begin negotiations toward a purchase and assumption sale, or (3) face receivership.

As of October 6, 1964, the capital deficit was approximately $217,000.00.

On January 29, 1965, Miller agreed to prevent the closing of the Bank by purchasing $105,000.00 worth of certificates of deposit over two months and to pledge them as security for the substandard loans of the Bank. These pledges were made, but no plan of recapitalization was drawn up. Miller ignored a request to furnish the Comptroller with a complete biographical and financial report on himself.

The examination of March 8, 1965, indicated that, despite the $105,000.00 worth of collateral certificates of deposit furnished by Miller, the Bank had an estimated actual loss of $56,000.00 on loans, with doubtful loans totaling approximately $252,000.00, and that these loans had to be either charged off or secured by additional collateral. The capital structure of the Bank was deficient by approximately $178,000.00 and losses alone would extinguish all of the undivided profits and necessitate invasion of the capital surplus. No quorum of the Bank Board had been convened since August, 1964, and no Directors' examination of the Bank's affairs had been made since February, 1963.

On April 6, 1965, it was learned that Miller had pledged his stock in Wellsville to the Bank of Hanover and Trust Company as collateral for a loan of approximately 60,000.00.

On July 19, 1965, the Comptroller instructed a National Bank Examiner to visit and report on the Bank's condtion on a weekly basis.

On November 8, 1965, the Bank's adjusted capital declined from minus $52,000.00 to minus $69,000.00. Close supervision in employment of funds by the Comptroller stabilized the Bank's liquidity position.

It was learned on December 30, 1965, that Miller had signed a collateral security agreement and bond for Wellsville under which he agreed to eliminate the $240,000.00 worth of loans then classified as "doubtful" and "loss", in installments over a 22-month period and to execute a mortgage on personal properties totaling $240,000.00, payable on or before the end of the 22-month period.

The examination of May 16, 1966, disclosed that nearly all loans classified as loss were out-of-territory loans obtained by Miller and that losses on these loans clearly exceeded capital funds even after consideration of Miller's security pledges of certificates of deposit. Miller

claimed that he would be unable to provide some $46,000.00 coming due under his installment agreement, but that he would soon be able to liquidate many of the classified loans. This claim never materialized.

On June 28, 1966, a meeting was held between the Wellsville Directors and agents of the Comptroller. It was disclosed that Miller was defaulting on his installment agreement and the charging off of the loss loans in the Bank's portfolio would result in actual insolvency. The Directors were told that a failure to effect a voluntary disposition of the Bank would result in the appointment of a Conservator and an involuntary sale. Miller's offer of $50,000.00 in securities as additional collateral was unacceptable to the Comptroller and the Directors were again told to accept a voluntary sale or face involuntary disposition by the Comptroller. All Directors, except Miller, expressed themselves in favor of a voluntary sale. The Board was subsequently informed by the Comptroller that acceptance of one of the existing purchase and assumption offers was the best solution for the Bank's problems and they were requested to enter negotiations immediately to that end.

On July 12, 1966, it was reported that an attempt by two Wellsville Directors to convene a Board meeting on the subject of a voluntary sale was aborted due to lack of a quorum.

On July 19, 1966, the Comptroller discussed with representatives of the Bank of Hanover and Trust Company the possibility of foreclosing on their unpaid loan to Miller and thus becoming owners of Miller's pledged stock. Foreclosure took place on September 20, 1966, and Hanover became the owner of 508 shares (50.8%) of the Wellsville stock.

On December 5, 1966, in its capacity as principal Wellsville shareholder, Hanover was advised by the Comptroller to effect a voluntary purchase and assumption

agreement or a conservatorship or receivership would be necessary.

As of December 6, 1966, Wellsville had loan losses of $266,000.00, which were secured to the extent of $95,000.00 in the Bank's own certificates of deposits. This deficit exceeded the Bank's capital structure by $91,000.00 and made the Bank insolvent, at least to the extent of $79,000.00.

On December 15, 1966, the Wellsville Directors were told of this offer and all but Miller expressed favor. At Miller's insistence they declined to vote on the offer. As he had on several previous occasions, Miller indicated certain persons were interested in buying the Bank, but, as before, he never disclosed their names.

On Januray 16, 1967, Miller was informed that January 20, 1967, would be the last date that the Comptroller would consider any further proposals on Miller's part, and that, unless the Hanover agreement was accepted or another specific offer was proposed, steps would be taken to effectuate an involuntary sale or liquidation.

As of January 17, 1967, over thirty per cent of the Bank's loan portfolio consisted of uncollected out-of-territory loans.

The turnover in high-level bank personnel was above average. Between August, 1964, and July, 1966, three Directors, a Vice President, and three Presidents, including Gordon Miller, tendered resignations. In addition, there were so many transfers, pledges and proxies of Bank Director qualifying shares that it was impossible to tell whether anyone was qualified to be a Director of the Bank.

On April 8, 1965; July 6, 1966; August 17, 1966, and February 13, 1967, respectively, the Comptroller transmitted information concerning Mr. Miller's possibly criminal activities to the Department of Justice for appropriate action.

On June 30, 1965, and July 6, 1966, the Comptroller similarly transmitted information concerning possible criminal violations by former President H. Elliot America.

These activities of Mr. Miller and Mr. America are now being considered by a Grand Jury of this Court.

In the opinion of the Comptroller, "the financial condition of the Wellsville National Bank on January 28, 1967, as well as the dangers of external takeover by groups which would constitute a threat to the preservation of those assets remaining, absolutely required an immediate sale to a responsible purchaser." Hanover was the only acceptable purchaser then prepared to enter immediately into a satisfactory purchase/assumption agreement.

Essentially, the Comptroller concluded there existed at Wellsville (1) improper banking practices which led to insolvency, (2) an inability of those in control of the Bank to raise needed new capital, (3) improper (and possibly criminal) activities by Gordon S. Miller and H. Elliot America, both past Presidents of the Bank.

STOCKHOLDERS' AVERMENTS

In the face of this detailed recitation, the stockholders aver: Wellsville was solvent, open, operating and meeting all demands upon it by depositors and creditors; approximately two years ago $500,000.00 in outstanding loans were ordered reduced by the Comptroller; by the end of 1966 only $150,000.00 worth of these criticized loans remained outstanding; at the end of 1966 the Bank had $91,000.00 in existing capital; the Bank building was independently appraised at $50,000.00; thus the paid-in capital plus the value of the building approximated $140,000.00, and financial impairment could not have exceeded $10,000.00 at the end of 1966. In this context, the stockholders argue (1) the appointment of the Conservator was illegal in the first instance, and (2) the agreement of sale between the Conservator and Hanover is "unjust and illegal."[7]

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[7] The stockholders enclosed as Exhibit "A" of their Motion to Intervene a letter dated February 6, 1967 (9 days after the Conservator's petition to sell the assets of the Conservatorship estate), from a representative of "a group of prominent citizens" willing and able to purchase the Wellsville Bank. Suffice it to say this belated "offer" is inappropriate for consideration by this Court in its supervisory role, especially at this juncture of the proceedings.

The stockholders allege that because "(c)apital was impaired to such a limited extent" and because such success had been shown in reducing capital impairment, the appointment of a Conservator of the Wellsville Bank was "arbitrary, capricious and constituted an abuse of discretion." Even assuming the correctness of the assertion that capital impairment was limited (which assertion stockholders have by no means shown), it does not follow appointment of a Conservator for Wellsville was an abuse of discretion. The major motivating factor that influenced the Comptroller to appoint a Conservator was the allegedly improper banking practices at Wellsville, not the capital impairment of the Bank.

The stockholders argue, even conceding the situation at Wellsville merited some action by the Comptroller, appointment of a Conservator was still an abuse of discretion. Essentially, the argument advanced by the stockholders is that a Conservator's role is literally limited by his title; i.e., a Conservator is restricted to conserving assets. Thus a Conservator, in the stockholders' perspective, cannot sell assets of the estate he is charged with "conserving." Only a Receiver has this power, stockholders assert.

The Court cannot agree. While this appears to be the first instance where a Conservator sought a sale of all the assets of the conservatorship estate, the question is not the novelty of the request, but its permissibility. It is true that the Bank Conservation Act is oriented towards securing temporary control of a bank suspected of being insolvent, but not so insolvent as to require appointment of a Receiver. Thus the Act speaks of a resumption of business (§ 205) or a reorganization thereof (§ 207). However, the Statute does grant to a Conservator, without restriction, the powers of a Receiver. A Receiver "may sell all the real and personal property" of a bank (with Court approval). Thus, in the absence of in-

hibiting language in the Statute, I concluded a Conservator can sell all of the assets of a bank, after obtaining requisite Court approval, even though the Statute contemplates an attempt will be made, in the usual case, to either reorganize or reopen the bank. The Conservator is not so restricted that he is limited to "conserving" the assets of the bank. For this very reason Court approval is required before a sale of bank assets can be made. Otherwise, the power of the Conservator, as agent of the Comptroller, would be unfettered. The appointment of the Conservator of the Wellsville Bank was not an abuse of discretion by the Comptroller and the Conservator was empowered to sell the assets of the Bank subject to this Court's approval.

The stockholders assault the agreement of sale contending the agreement masks a reorganization of the Bank, which calls into play § 207 of the Act. Section 207 of the Act requirs, among other things, consent in writing to a reorganization by creditors and/or stockholders. This section is applicable, however, only to "a plan of a kind, which, under existing law requires . . . consent" of creditors and/or stockholders. Section 192 (as incorporated into § 203), under which the Conservator acted, eschews consent of shareholders and creditors by vesting the Comptroller with power to act whenever "he shall deem it necessary" (§ 203 *supra* at pr. 1). Admittedly, this is a drastic procedure. But banking history shows the application of summary supervisory authority is customary and is not unconstitutional in and of itself. Fahey v. Mallonee, 332 U. S. 245 (1947). Section 207, contemplating only procedures which envisioned consent of creditors and/or stockholders before action could commence, is not applicable to § 192, which never contemplated such consent.

Lastly, the stockholders argue the Agreement of Sale is illegal because Wellsville shareholders are not

adequately provided for. The contract between the Conservator and Hanover provides the the purchaser "through the exercise of due diligence and prudent business practices" shall collect classified (i.e., doubtful) loans and put excess proceeds into a separate account for the benefit of the Wellsville shareholders. The adequacy of the protection afforded Wellsville shareholders is then dependent upon how effectively Hanover collects classified debts. That Hanover will make such collections to the best of the ability is insured by the fact that Hanover itself is the largest stockholder in Wellsville (50.8% of the stock) and thus stands to gain the most from diligent collection efforts.

The Court is convinced of the correctness of its Order of January 28, 1967, as the stockholders have failed to assert sufficient reasons showing that the envisioned sale of assets would be fraudulent, arbitrary or capricious. The motion of Gordon S. Miller and Frances G. Miller to have the Court vacate its Order of January 28, 1967, will be denied.

WILLIAM J. NEALON, JR.
United States District Judge

September 19, 1967

ORDER

Now, September 19, 1967, in accordance with the Memorandum this day filed, it is hereby Ordered and Decreed that the motions of Gordon S. Miller and Frances G. Miller to intervene and to have the Court vacate its Order of January 28, 1967, are denied.

WILLIAM J. NEALON, JR.
United States District Judge